

ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments)

FM Broadcast Stations)

(Arlington, The Dalles, Moro, Fossil, Astoria,)

Gladstone, Portland, Tillamook,)

Springfield-Eugene, Coos Bay, Manzanita)

and Hermiston, Oregon, and)

Covington, Trout Lake, Shoreline, Bellingham,)

Forks, Hoquiam, Aberdeen, Walla Walla,)

Kent, College Place, Long Beach and)

Ilwaco, Washington))

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MB Docket No. 02-136

RM-10458

RM-10663

RM-10667

RM-10668

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SEP 27 2004

To: Office of the Secretary

Attn: The Commission

Federal Communications Commission
Office of Secretary

OPPOSITION TO PETITION FOR RECONSIDERATION

MID-COLUMBIA BROADCASTING,
INC.

FIRST BROADCASTING INVESTMENT
PARTNERS, LLC

J. Dominic Monahan
Luvaas Cobb Richards & Fraser, PC
777 High Street
Suite 300
Eugene, OR 97401
(541) 484-9292

Mark N. Lipp
Vinson & Elkins, LLP
1455 Pennsylvania Avenue, NW
Suite 600
Washington, DC 20004
(202) 639-6500

Its Counsel

Its Counsel

September 27, 2004

No. of Copies rec'd 074
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SUMMARY

Mid-Columbia Broadcasting, Inc. and First Broadcasting Investment Partners, LLC (“Joint Parties”), oppose the Petition for Reconsideration filed by Mercer Island School District in this proceeding. Not one of the arguments raised by Mercer Island is worthy of reconsideration. First, the Commission did not err when it failed to consider certain untimely and unauthorized filings of MISD, because it was under no obligation to consider them. Second, Mercer Island’s request that its secondary Class D station be converted to a Class A allotment is not properly before the Commission, because it was introduced too late in the proceeding and its consideration would violate rules of administrative procedure. Moreover, even if the Commission were able to consider such a request, it could not grant it without completely revising the principles upon which secondary service is founded. Third, the Commission’s action in processing and granting the Joint Parties’ initial proposal for Covington, Washington after their amended proposal for Kent, Washington was rendered defective by subsequent events was in accord with precedent and reasonable under the circumstances. Finally, the Commission’s decision that Covington, an incorporated, self-governed city of more than 13,000 people, is deserving of a first local service was well-supported by evidence in the record, including evidence introduced by Mercer Island itself.

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OPPOSITION TO PETITION FOR RECONSIDERATION

Mid-Columbia Broadcasting, Inc. ("Mid-Columbia"), licensee of Station KMCQ(FM), The Dalles, Oregon and First Broadcasting Investment Partners, LLC ("First Broadcasting") ("Joint Parties"), by their respective counsel, hereby oppose the Petition for Reconsideration filed in the above-captioned proceeding on August 20, 2004, by Mercer Island School District ("MISD"). MISD raises four arguments on reconsideration: (1) the Commission should have considered certain of MISD's filings that were submitted after the deadline for comments and reply comments in this proceeding; (2) the Commission should have converted MISD's secondary Class D station to a primary service Class A allotment; (3) the Commission should not have processed the Joint Parties' proposal for Covington, Washington after its amended proposal for Kent, Washington proved to be defective; and (4) the Commission should not have found Covington to be independent from Seattle. However, not one of these arguments forms a basis

for reconsideration in this case. The Commission's action was in accord with precedent and in the public interest, and it should not be disturbed.

I. The Commission Was Not Obligated to Consider MISD's Unauthorized and Untimely Filings.

1. MISD complains that the Commission failed to consider five pleadings that MISD filed in this proceeding, four of which were filed after the close of all comments in this proceeding. The one timely filing that MISD alleges was not considered was its reply comments to the Joint Parties' Kent proposal. In light of subsequent events (the Commission did not consider the Kent proposal), this pleading was moot, and did not have to be considered. As to the other four, the Commission is under no obligation to consider any untimely pleading. 47 C.F.R. § 1.415(d). Therefore, whether the Commission failed to analyze these pleadings or simply failed to mention them in the *Report and Order*, there are no grounds for reconsideration in either case.

II. The Commission Cannot Grant MISD's Request for a Class A Allotment Because That Request is Procedurally and Substantively Defective.

2. MISD argues that the Commission failed to give consideration to its request for a Class A allotment at Mercer Island. However, doing so would require the Commission to ignore bedrock requirements of administrative procedure as well as its own substantive rules. MISD's request for a Class A allotment was untimely and grossly defective. It was untimely because it was a counterproposal that was filed after the deadline for comments in this proceeding.¹ An allotment at Mercer Island on Channel 283A would likely have been mutually exclusive with the proposed allotment of Channel 283C3 at Covington, Washington as well as with the allotment of Channel 283C2 at Shoreline, Washington, proposed by Triple Bogey. But a counterproposal

¹ MISD first advanced the Class A proposal in a "supplement" filed on February 2, 2004. The comment deadline was July 29, 2002. *Notice of Proposed Rule Making*, 17 FCC Rcd 10678 (2002).

must be filed in comments. 47 C.F.R. § 1.420(d). *See also Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990). An untimely counterproposal, filed after the comment deadline, cannot be considered. *Bainbridge, Georgia*, 13 FCC Rcd 6424 (1998); *Pinewood, South Carolina*, *supra*. Moreover, MISD's counterproposal would have introduced a new community into the proceeding after the comment deadline. Petition for Reconsideration at 1 note 1. This is impermissible under principles of administrative law. *Corpus Christi and Three Rivers, Texas*, 11 FCC Rcd 517 (1996). For these reasons, the Commission is barred from considering MISD's Class A proposal.

3. While these procedural violations alone would have been enough to dismiss MISD's Class A request, it also could not be granted because it was grossly defective. First, MISD failed to include a channel spacing study demonstrating that the allotment of Channel 283A can be made at Mercer Island in compliance with the Commission's Rules, and thus failed to meet the minimum requirements for acceptability, even had its counterproposal been timely filed. *See Liberty, New York*, 8 FCC Rcd 4085 (1993). Second, while admitting that the allotment would not meet the required separation distance to KAFE(FM), Bellingham, Washington at that station's current site, MISD attempts to demonstrate that there would be no contour overlap with KAFE through the use of a study based on the Longley-Rice terrain-sensitive prediction methodology. While the Commission does accept Longley-Rice studies in some circumstances, it does not do so in FM allotment proceedings to demonstrate that no overlap exists. Furthermore, the allotment of a channel is not based on overlap but spacing. *See Section 73.207(a)*. *See Amendments of Parts 73 and 74 of the Commission's Rules To Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, 12 FCC Rcd 12371, 12402 (1999) ("supplemental showings have not been accepted, nor will be accepted, for

the purpose of determining interference or prohibited contour overlap between FM broadcast stations”).² Finally, MISD is proposing to have its license for the Class D facility modified to the Class A channel. There is absolutely no precedent cited by MISD nor any that exists to authorize the modification of a secondary service license (Class D) to a primary service facility (Class A). The Commission should decline to do so here. As a result there is no Commission error and no grounds for reconsideration.

III. The Commission Properly Considered and Processed the Covington Proposal.

4. MISD argues that the Commission should not have accepted the Joint Parties’ amended proposal for Kent, Washington, citing *Taccoa, Sugar Hill, and Lawrenceville, Georgia*, 16 FCC Rcd 21191 (2001). Pet. for Recon. at 4-6. This argument is unfounded, because the Commission did *not* accept the Kent proposal. Rather, the Commission said that in view of the circumstances it *could* have accepted the Kent proposal, but it did not have to do so because of subsequent developments. *Report and Order* at ¶ 3. Having set up a straw man, MISD then attempts to shoot it down. It argues that once the Commission accepted the Kent proposal, it should not have allowed the Joint Parties to withdraw it. Pet. for Recon. at 6-10. But as discussed above, the Commission did not accept the Kent proposal, so this argument is deceptive and misleading. The truth is that the Commission processed the only proposal properly before it, which was the Covington proposal. *Accord, Gunnison, Colorado, et al.*, DA 04-2908 (rel. Sept. 20, 2004) at note 3 (Commission did not have to consider the arguments regarding reinstatement of a proposal because it had never acted upon the request for withdrawal of that proposal in the first place).

² On reconsideration, MISD asserts that the Commission should have waived Section 73.207 in this case. This is a remarkable assertion, given that MISD has never asked for a waiver. To the extent that the petition for reconsideration should be deemed to constitute a request for waiver, that request should be denied because MISD offers no explanation why it did not advance such a request at an earlier opportunity. See 47 C.F.R. § 1.429(b).

5. The Commission's action in processing the Covington proposal was reasonable from a policy standpoint and consistent with prior case law. Consideration of the Covington proposal furthers the Commission's goal of rapidly introducing new service in the public interest, and avoids needless duplication of effort. The only other conflicting proposal, filed by Triple Bogey, LLC, MCC Radio, LLC, and KDUX Acquisition, LLC (collectively "Triple Bogey"), was defective for failure to include the necessary consent of Saga Broadcasting, LLC, the licensee of KAFE, Bellingham, Washington. This is the same reason that the Joint Parties' Kent proposal became defective once Saga withdrew its consent.³ But the Covington proposal was acceptable, and was not in conflict with any acceptable proposal in the proceeding. It had already been set forth in the *Notice of Proposed Rule Making*, 17 FCC Rcd 10678 (MB 2002), and the interested public had already had the opportunity to comment on it. Therefore, its processing was in harmony with principles of administrative law. On the other hand, if the staff had dismissed the Covington proposal, the Joint Parties could have immediately re-filed it. That would just result in needless duplication of processing effort and delays in the introduction of service.

6. Moreover, the decision to process and grant the Covington proposal was in accord with precedent. MISD argues that the Commission could not grant the Covington proposal in the absence of an explicit expression of continuing interest, but this argument elevates form over function. In *Taccoa, supra*, the original petitioner proposed to reallocate a channel from Toccoa to Sugar Hill, Georgia. At the comment deadline, the petitioner counterproposed to allocate the

³ MISD appears to be confused about the basic facts. See Pet. for Recon. at 10. As Saga and the Joint Parties have clearly represented, Saga has withdrawn its consent to the channel substitution at Bellingham, and the parties have terminated their contractual arrangements. There is no agreement between Saga and the Joint Parties regarding a channel change for KAFE, although, as reported in prior filings, there have been negotiations between First Broadcasting and Saga in an attempt to reach an agreement just as there have been discussions between representatives of Triple Bogey and Saga towards a similar end.

channel to Lawrenceville, Georgia instead of Sugar Hill as originally proposed, expressing an interest in the Lawrenceville allotment. The Commission nevertheless granted the Sugar Hill allotment without requiring an additional expression of interest. *Taccoa, Georgia, et. al*, 16 FCC Rcd 14069 (2001), *recon.*, 16 FCC Rcd 21191 (2001). Only when, on reconsideration, the petitioner expressly *withdrew* its expression of interest in Sugar Hill, did the Commission set aside its action granting an allotment to Sugar Hill. *Taccoa*, 16 FCC Rcd at 21191. The staff action in this case was consistent with *Taccoa*. Here, as in *Taccoa*, no expression of interest was required in order to reinstate the original proposal when the counterproposal could not be granted. *See also Gunnison, Colorado, supra*, at note 3, where the Commission considered a counterproposal after a request for withdrawal and subsequent reinstatement.

IV. The Commission Properly Found Covington to be Deserving of a First Local Service Preference.

7. The Commission easily found that Covington is deserving of a first local service preference. MISD complains that the Commission's analysis was "cursory" and that it failed to consider MISD's evidence. Pet. for Recon. at 15. However, as an incorporated, self-governing city, Covington's independence from Seattle was firmly established, and the Commission's discussion was sufficient to establish that it had considered the evidence. As to the threshold criteria, Covington's "substantial" population of 13,081 supports consideration as a first local service. As to the independence factors, the Commission found that factors 4 (local government and elected officials), 5 (ZIP code), 6 (commercial establishments, health care facilities, civic organizations) and 8 (police and fire protection, water and sanitation services) clearly weigh in favor of Covington's independence. In addition, the Commission noted, for services such as schools and libraries that Covington does not supply itself, it is not dependent upon Seattle.

Instead, these services are provided independently of Seattle by the Kent School District and King County.

8. In addition to these four factors, MISD's own evidence that 35 percent of Covington's civilian labor force and 18 percent of its total population works in Covington (figures that were not available at the time of the Joint Parties' filing) demonstrates that *Tuck* factor 1 is satisfied. Contrary to MISD's assertion, there is no requirement that "a majority of residents live and work in the community." *See* Pet. for Recon. at 18.⁴ The employment figures for Covington are far greater than those of other communities adjudged to be independent. In *Anniston, Alabama, et al.*, 16 FCC Rcd 3411, 3413 (2001), the Commission held that the fact that 16 percent of the residents of College Park worked in College Park was sufficient for a favorable finding on this factor. *See also Albemarle and Indian Trail, North Carolina*, 16 FCC Rcd 13876, 13880 (2001) (11.3 percent of working-age residents worked in the community); *Coolidge and Gilbert, Arizona*, 11 FCC Rcd 3610 (1996) (13 percent of Gilbert's working population worked in Gilbert). Therefore, at least five of the eight *Tuck* factors clearly support Covington's independence. MISD provides no significant evidence to the contrary. *See* Pet. for Recon. at 20-22.⁵

9. As to the other factors, MISD errs when it argues that Covington's dependence on the larger urbanized area (as opposed to Seattle itself) weighs against its independence from Seattle. *See* Pet. for Recon. at 22-23. In fact, it weighs in favor of independence. The *Tuck* inquiry, and the *Huntington* doctrine upon which it is based, focus upon the independence of the

⁴ The case cited by MISD, *Pleasanton, Bandera Hondo and Schertz, Texas*, 15 FCC Rcd 3068, 3071 (2000) is not definitive. The statement therein is unsupported dictum, and is clearly contradicted by more recent cases. *See Anniston, Alabama*, *infra*.

⁵ For example, MISD notes that Covington's ZIP code is shared with other neighboring communities. Pet. for Recon. at 20-21. This is irrelevant. What matters is that it is not a Seattle ZIP code.

suburban community *from the central city*, not from the urbanized area. In *Tuck*, the Commission definitively characterized the criterion as the “interdependence or independence of the specified ‘community’ to the central city of the ‘urbanized area.’” See also *Debra D. Carrigan*, 100 FCC 2d 721, 729 (1985); *Miners Broadcasting Service v. FCC*, 349 F.2d 199, 202 n.6 (D.C. Cir. 1965). Therefore, the fact that some of Covington’s municipal services are provided by King County and the City of Kent weighs strongly in favor of Covington’s independence, not against it. Similarly, the fact that Covington is served by the daily South County Journal – a local community newspaper that is not a Seattle media outlet – means that factor 2 (newspapers and other media) stands in favor of Covington’s independence, bringing the total number of factors to six. This amply demonstrates Covington’s independence from Seattle. See *Parker and Port St. Joe, Florida*, 11 FCC Rcd 1095 (1996).

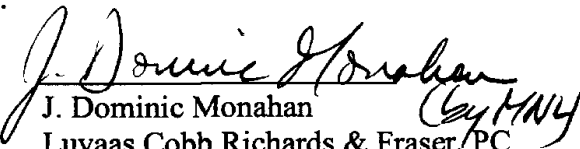
CONCLUSION

WHEREFORE, for the foregoing reasons, the Commission should deny MISD’s petition for reconsideration and affirm the *Report and Order* in all respects.

Respectfully submitted,

MID-COLUMBIA BROADCASTING,
INC.

By:

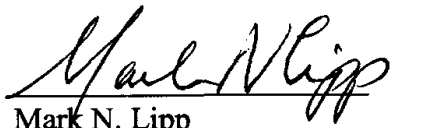

J. Dominic Monahan
Luvaas Cobb Richards & Fraser, PC
777 High Street
Suite 300
Eugene, OR 97401
(541) 484-9292

Its Counsel

September 27, 2004

FIRST BROADCASTING INVESTMENT
PARTNERS, LLC

By:


Mark N. Lipp
Vinson & Elkins, LLP
1455 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 639-6500

Its Counsel

CERTIFICATE OF SERVICE

I, Lisa M. Holland, a secretary in the law firm of Vinson & Elkins, do hereby certify that I have on this 27th day of September, 2004 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "Opposition to Motion for Stay" to the following:

Robert Hayne, Esq.
Federal Communications Commission
236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

Rod Smith
13502 NE 78th Circle
Vancouver, WA 98682-3309

Merle E. Dowd
9105 Fortuna Drive
8415
Mercer Island, WA 98040

Robert Casserd
4735 N.E. 4th Street
Renton, WA 98059

Chris Goelz
8836 SE 60th Street
Mercer Island, WA 98040

Matthew H. McCormick, Esq.
Reddy, Begley & McCormick
1156 15th Street, NW, Suite 610
Washington, DC 20005-1770
(Counsel to Triple Bogey, LLC et al.)

Harry E. Cole, Esq.
Liliana E. Ward, Esq.
Fletcher Heald & Hildreth
1300 N. 17th Street
11th Floor
Arlington, VA 22209
(Counsel to CHRISTA Ministries, Inc.)

M. Anne Swanson, Esq.
Nam E. Kim, Esq.
Dow Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036
(Counsel to New Northwest Broadcasters LLC)

Howard J. Barr, Esq.
Womble Carlyle Sandridge & Rice, PLLC
1401 Eye Street, NW
7th Floor
Washington, DC 20005
(Counsel to Mercer Island School District et al.)

City of Gig Harbor
3510 Grandview Street
Gig Harbor, WA 98335

Dennis J. Kelly, Esq.
Law Office of Dennis J. Kelly
P.O. Box 41177
Washington, DC 20018
(Counsel to Two Hearts Communications LLC)

Cary S. Tepper, Esq.
Booth Freret Imlay & Tepper, P.C.
14356 Cape May Road
Silver Spring, MD 20904-6011
(Counsel to Bay Cities Building Company, Inc.)

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
5028 Wisconsin Ave., N.W.
Suite 301
Washington, D.C. 20016
(Counsel to Saga Broadcasting, LLC)



Lisa M. Holland